UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MGM GRAND HOTEL, LLC,

Employer

Case No. 28-RC-225344

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner.

_____/

PETITIONER'S RESPONSE IN OPPOSITION TO RESPONSDENT'S REQUEST FOR REVIEW

Pursuant to National Labor Relations Board Rule §102.67(f), Petitioner International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) responds in opposition to Respondent MGM Grand Hotel, LLC's request for review of the Regional Director's January 15, 2019 decision and direction of a second election ("DDE"). The DDE and the Regional Director's January 14, 2019 Order denying Respondent's frivolous motion to dismiss the petition and/or require a new showing of interest were based on well-established Board caselaw. *See* Ex. A, D to Resp.'s Req. for Rev. None of the grounds for review set forth in §102.67(d) of the Board's Rules are present in this case, and Respondent does not cite a single relevant case in support of its position. Respondent's request is nothing more than a baseless attempt to harass and further delay the Union's certification as representative of the petitioned-for unit, and it must be rejected.

I. BACKGROUND

On August 9, 2018, Petitioner filed a petition seeking to represent a unit of approximately 57 Guest Service Representatives at Respondent's Las Vegas, Nevada casino. *See* Hearing Officer's Rep. at 3 (attached to Resp.'s Req. for Rev. as Ex. B). The parties reached a stipulated election agreement on August 16, 2018. *Id.* On August 24, 2018, Respondent filed unfair labor practice charge 28-CB-226241 against Petitioner, alleging that employees with the title Slot Supervisor, who were not included the petitioned-for unit, were agents of the Petitioner and that the Petitioner had directed them to engage in pro-union conduct. Respondent sought to block the election with this charge, but after investigation the Regional Director declined to do so,[1] and the election moved forward on August 30, 2018. Respondent later withdrew the unfair labor practice charge. Notably, Respondent made no attempt prior to the first election to challenge the showing of interest submitted by Petitioner in support of the petition, nor did it file a pre-election motion to dismiss the petition.

In the August 30, 2018 election, 32 employees voted for the Petitioner and 23 voted against. *Id.* On August 31, 2018, Respondent filed objections to the election, alleging that the results were tainted by slot supervisors' pro-union activity and that these slot supervisors were agents of the union, therefore both Petitioner and the slot supervisors engaged in objectionable conduct. *Id.* Respondent concluded its objections by requesting "that the Regional Director review and investigate the aforementioned conduct and set aside the results of the election or, in the alternative, order a hearing thereon." The Region conducted a hearing on Respondent's objections over six non-consecutive days in September and October 2018. *See* RD's Order Denying Mot. to

[1] Respondent incorrectly asserts that the Regional Director "performed no investigation" and "did not solicit evidence from the Union" prior to declining to block the election. Resp.'s Req. for Rev. at 4. Respondent has zero evidence for this assertion.

Dismiss (attached to Resp.'s Req. for Rev. as Ex. D). On November 20, 2018, the Hearing Officer issued a Report on Objections rejecting Respondent's first objection, which alleged that Petitioner engaged in objectionable conduct because slot supervisors were agents of the Union. *See* Hearing Officer's Rep. at 20. The Hearing Officer found insufficient evidence to support the allegation of agency. *Id.* However, the Hearing Officer recommended that Respondent's second objection be sustained because actions of some slot supervisors tainted the results of the election, and she recommended that the election be set aside. *Id.* Neither party filed exceptions to the Hearing Officer's Report, which were due on December 4, 2018.

In mid-December 2018, the Region contacted the parties to solicit their positions on a date, time, and location for a second election. After refusing to agree to a date for the second election, on January 7, 2019, Respondent filed a "Motion to Dismiss the Petition, or in the Alternative Require a New Showing of Interest." Petitioner filed a response in opposition, and on January 14, 2019, the Regional Director issued an Order denying the Motion as an untimely attempt to except to the Hearing Officer's Report, and as without merit under longstanding and well-established Board caselaw. The following day, on January 15, 2019, the Regional Director issued the DDE for the second election, which was held on January 24, 2019. A majority of Guest Service Representatives again voted to be represented by the UAW.

II. ARGUMENT

Pursuant to Rule § 102.67(d), a request for review is granted "only where compelling reasons exist therefore," and "only upon one or more of the following grounds:"

> (1) That a substantial question of law or policy is raised because of:
> (i) The absence of; or
> (ii) A departure from, officially reported Board precedent.
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
> (3) That the conduct of any hearing or any ruling made in connection with the

proceeding has resulted in prejudicial error.
(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

None of these grounds exist in this case. Respondent presents no arguments that could be construed as falling under the second, third or fourth grounds, nor does it argue that there is an absence of Board precedent. Assuming Respondent is arguing that the Regional Director departed from reported Board precedent, that argument is plainly without merit. As explained below, the Regional Director's DDE, immediately preceded by the Order denying Respondent's frivolous motion to dismiss the petition or require a new showing of interest, were based on well-established Board precedent, and relied on the factual record developed at hearing and set forth in the Hearing Officer's Report, to which Respondent did not file any exceptions. Accordingly, there is no basis under Rule § 102.67(d) for granting the request for review.

The Board's cases are clear that where an election is set aside due to objections, the remedy is to conduct a new election, not to dismiss the petition or require a new showing of interest. *See, e.g.*, *Madison Square Garden CT, LLC*, 350 NLRB 117, 117 (2007) ("Having carefully considered the entire record, we find that the supervisors' prounion behavior was objectionable conduct warranting a second election."); *SNE Enterprises, Inc.*, 348 NLRB 1041, 1044 (2006) ("We find that the lead persons' solicitation of cards constituted objectionable coercive conduct and materially affected the outcome of the election. Accordingly, we set aside the results of the election and direct a second election."); *Chinese Daily News*, 344 NLRB 1071, 1073 (2005) ("Given that all eight employees directly supervised by Lin were exposed to his card solicitation activities, and seven signed cards in his presence, we find that this conduct materially affected the outcome of the election . . . and we direct a second election."); *Harborside Healthcare, Inc.*, 343 NLRB 906, 906 (2004) ("[W]e conclude that the supervisory prounion conduct at issue here was objectionable

. . . We therefore set aside the election and direct a second election in the stipulated bargaining unit."). In *Madison Square Garden*, the Board specifically rejected an argument by the respondent that a new showing of interest was required prior to a second election:

> We find no merit in the Employer's argument that the Board should require a new showing of interest on the part of the Petitioner. The Employer points to no case law in support of its contention that a new showing of interest is justified; rather, the Employer cites *Harborside*, supra, and *Chinese Daily*, supra, cases where the Board directed a second election and did not demand a new showing of interest. See also *River City Elevator Co.*, 339 NLRB 616, 617 (2003) (refusing to require a new showing of interest following a finding of objectionable union conduct).

Madison Square Garden, 350 NLRB at 117 n.4. Accordingly, the Regional Director was on solid legal footing when he directed a second election to be held nearly five months after the first election.

In *River City Elevator*, the Board noted its "long-held practice to direct a new election if objectionable conduct requires setting aside the results of a prior election." 339 NLRB at 616. The Board explained that it adheres to this practice because,

> First and foremost, once a valid question concerning representation has been raised, we believe that the statutory policy of free choice in the selection of bargaining representative should be afforded maximum expression, by pursuing the process through its end in a valid election vote by secret ballot. To roll back the representation procedures further than a new election, however, and require another administrative showing of interest, could result in preemption of the employees' statutory right to a Board-conducted secret-ballot election. There is no need or compelling reason to do that.

Id. at 617. Likewise, in *Gaylord Bag Company*, a case cited by the Regional Director here, the Board explained that the showing of interest is exclusively within the Board's discretion, and not subject to litigation following an election:

> The Board consistently has held that the showing of interest is a matter for administrative determination, and is not litigable by the parties. See, e.g., *Barnes Hospital*, 306 NLRB 201 fn. 2 (1992); *Globe Iron Foundry*, 112 NLRB 1200 (1955); *Potomac Electric Power Co.*, 111 NLRB 553, 554 (1955). It is exclusively within the Board's discretion to determine whether a party's showing of interest is

> sufficient to warrant processing a petition. *S. H. Kress & Co*., 137 NLRB 1244, 1248 (1962). The purpose of a showing of interest is to determine whether the conduct of an election serves a useful purpose under the statute—that is, whether there is sufficient employee interest to warrant the expenditure of time, effort, and funds to conduct an election. *NLRB v. J. I. Case Co*., 201 F.2d 597 (9th Cir. 1953); *Stockton Roofing Co*., 304 NLRB 699 (1991), and cases cited there. Whether the employees desire representation is determined by the election, not by the showing of interest. *NLRB v. J. I. Case Co*., supra.
>
> Here, the showing of interest was administratively determined to be adequate at the time it was submitted. There is no indication that, at that time, the Regional Director was presented with evidence that cards were invalid. See *Goldblatt Bros., Inc*., 118 NLRB 643 fn. 1 (1957). Thereafter, an election was conducted and the Petitioner won. *Pursuant to the Board's established policy, after the election the adequacy of the showing of interest is irrelevant*.

313 NLRB 306, 306-07 (1993) (emphasis added). *See also* NLRB Casehandling Manual § 11028.4 ("After an election has been held, the adequacy of the showing of interest is irrelevant . . . Accordingly, challenges to the adequacy of the showing of interest may not be raised after an election has been held.").

Here, the Regional Director correctly applied the above cases in directing a second election. Moreover, in rejecting Respondent's belated attempt to dismiss the petition or challenge the showing of interest, the Regional Director noted that he had "carefully examined the extent of the showing of interest, and, even considering its adequacy in light of the facts found in the Hearing Officer's report, I am satisfied that it is adequate to support the petition." Order Denying Mot. to Dismiss at 6 (attached as Ex. D to Resp.'s Req. for Rev.). In other words, the Regional Director has concluded, based on the overwhelming showing of interest submitted by Petitioner, that notwithstanding slot supervisors' objectionable conduct, the showing of interest continues to be sufficient to support the petition. Respondent does not even attempt to contend with this finding in its Request for Review.

Nothing that Respondent cites in its Request for Review is contrary to the above cases or supports its argument that the Regional Director should have dismissed the petition or required a new showing of interest following the issuance of the Hearing Officer's Report. First, almost all of the cases that MGM cites involved litigation over the showing of interest and/or a motion by the respondent to dismiss the petition *prior to* an election being held. *See Dejana Indus., Inc.*, 336 NLRB 1202 (2001); *Entergy Sys. & Serv., Inc.*, 328 NLRB 902 (1999); *Ara Leisure Servs.*, 272 NLRB 1300 (1984); *Nat'l Gypsum Co.*, 215 NLRB 74 (1974).[2] By contrast, the instant case involves post-election objections, a completely distinguishable procedural posture. In fact, in one of the cases cited by Respondent, the Board highlighted the differences between a pre-election motion to dismiss the petition and a post-election objections case by noting that, "the Regional Director erred by applying the test . . . used by the Board to evaluate prounion supervisory conduct in objections cases raising the issue of whether a supervisor's prounion conduct throughout the entire election campaign warrants setting aside an election," which "is not to be used in cases, such as the one before us, where the issue is solely whether the petition should be dismissed because the showing of interest has been tainted." *Dejana*, 336 NLRB at 1202 n.2. Thus, none of these cases are remotely applicable to the instant post-election objection case.[3]

[2] Respondent claims that the Regional Director rejected these cases because "they are old and predate *Harborside Healthcare*," Req. for Rev. at 3, but the Regional Director never said that anywhere in the Order denying Respondent's Motion to Dismiss (or in the DDE). Rather, as discussed above, the Regional Director cited *Madison Square Garden*, *SNE*, *Gaylord Bag*, and other cases that are directly on point. Accordingly, Respondent's attempt to paint the Regional Director's decision as "not compelling and . . . inconsistent with the law" is not persuasive.

[3] Respondent also misleadingly suggests in its request for review that *Dejana*, *Entergy* and *National Gypsum* involved supervisory conduct that "would continue to taint even a second election." Resp.'s Req. for Rev. at 12. Contrary to Respondent's suggestion, none of these cases involved even a *first* election, much less a second one, and the Board plainly did not address in them the proper next steps after objections to an election are sustained.

Second, the only case cited by Respondent in support of its Request for Review that involved post-election objections is *Delchamps, Inc.*, 210 NLRB 179 (1974), but that case is factually distinguishable because, unlike here, a substantial number of statutory supervisors had voted in the challenged election. In *Delchamps*, the union petitioned for a multi-location unit of "all meat department employees, including meat department managers." *Id.* at 179. The employer sought to dismiss the petition prior to the election, arguing that the managers were supervisors under Section 2(11) of the Act and therefore could not be included in the unit, but the election proceeded. After the election, the employer filed objections, renewing its argument that the managers were statutory supervisors and thus should not have been included in the unit, and arguing that they had tainted the election by engaging in pro-union conduct. Noting that "[m]any" of the managers had "cast unchallenged ballots in the election," the Board held that "*their inclusion in the unit* . . . and their activities in support of the Petitioner . . . leads us to conclude that it will best effectuate the policies of the Act to vacate the election conducted herein and to order the dismissal of the instant petition." *Id.* at 180 (emphasis added). Unlike *Delchamps*, none of the members of petitioned-for unit, which is solely comprised Guest Service Representatives, have ever been alleged to be statutory supervisors; Respondent conceded that they are not by stipulating to an election. Accordingly, *Delchamps* is factually distinguishable from the instant case, and from the relevant cases discussed above and relied upon by the Regional Director in directing a second election. In short, Respondent has not presented a single prior Board decision that supports its argument that the Regional Director should have dismissed the petition or required a new showing of interest rather than directing a second election.

Third, Respondent's attempts to bootstrap its withdrawn unfair labor practice charge onto the current matter has no legal or factual support and must be rejected out of hand. Respondent

alleged in the charge that Petitioner was responsible for slot supervisors' pro-union conduct because they were agents of the Union. The Regional Director declined to block the election, and Respondent raised the same allegation in one of its two post-election objections. The Hearing Officer recommended in her Report that that objection be overruled, "as the Employer has not proffered sufficient evidence showing that slot supervisors were agents of the Union." Hearing Officer's Rep. at 20. Respondent did not except to that finding, and it also withdrew the then still-pending charge. Nonetheless, Respondent inexplicably argues that the instant Request for Review should be granted, in part, because it was "prejudice[d]" by the Region's failure to block the election on the basis of the charge. *See* Resp.'s Req. for Rev. at 13. This is complete nonsense. Contrary to Respondent's assertions, (1) Respondent presents no evidence, only bare (and incorrect) assertions that the Regional Director failed to properly handle or investigate the charge pre-election, (2) post-election, Respondent had a full and fair opportunity to litigate the substance of the allegation, in connection with its claim that the Petitioner engaged in objectionable conduct due to an agency relationship with the slot supervisors, (3) the Hearing Officer rejected that argument as lacking factual support, (4) Respondent did not file exceptions to the Hearing Officer's Report, and (5) Respondent then withdrew the charge, ostensibly because it knew it had no evidence to support it. Accordingly, Respondent's argument that the Regional Director's handling of the now withdrawn charge justifies dismissal of the petition at this stage of the case is completely bogus.

Respondent's failure to except to the Hearing Officer's recommendation on its first objection is also related to the timeliness of its post-election, post-hearing argument that the petition should be dismissed. The Regional Director concluded that Respondent's motion to dismiss the petition, filed well over a month after the time for filing exceptions to the Hearing

Officer's Report had elapsed, was untimely. Respondent twists itself in knots arguing that the Regional Director's conclusion was in error, but the Regional Director's conclusion was correct. Once again, Respondent could have excepted to the Hearing Officer's finding that Petitioner did not engage in objectionable conduct, but it did not do so. Any attempt to relitigate that issue now in support of a belated motion to dismiss the petition is plainly untimely.

Finally, Respondent's request for "extraordinary relief of expedited consideration of its request and a stay of the election" pursuant to Section 102.67(j) is moot. *See* Resp.'s Req. for Rev. at 14. Respondent sloppily asserts that such relief "is necessary because a second election is scheduled to occur on January 24, 2019," *id.*, but it did not file the Request for Review until January 29, 2019, five days after the election, and five days after it learned that, once again, a majority of the petitioned-for unit voted to be represented by the UAW. This strongly suggests that Respondent knows that its Request for Review is frivolous, and only filed it for purposes of harassment and delaying certification of the Union and bargaining with its employees.

III. CONCLUSION

The Regional Director appropriately refused to dismiss the petition or require a new showing of interest months after the first election, and instead relied on long-standing Board precedent to direct a second election. That second election has now been held, and a majority of employees have again selected Petitioner as their representative. None of the grounds for review set forth in Section 102.67(d) are present, and the Board should deny the Request for Review.

Respectfully submitted,

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Dated: February 5, 2019.

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2019, I filed the foregoing with the National Labor Relations Board via the Board's electronic filing system. I hereby also certify that on February 5, 2019, I served the foregoing, via email, upon:

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